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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY EUGENE CALVERY,

Defendant and Appellant.

C061540

(Super. Ct. No. 07F10362)

Defendant Randy Eugene Calvery entered a no contest plea to five charges: possession of methamphetamine for sale; transportation of methamphetamine; possession of methamphetamine; possession of narcotics paraphernalia, a misdemeanor; and possession of less than an ounce of marijuana, a misdemeanor. At sentencing, the court concluded that possession of methamphetamine was a lesser included offense and dismissed the count. The court imposed an aggregate three-year

prison term, suspended execution of sentence, and granted probation.

Defendant appeals. He contends the minute order of sentencing must be corrected to reflect the court's oral pronouncement of sentence and that certain fees were erroneously imposed as conditions of probation rather than as a separate order. We are required to remand to the sentencing court due to the discrepancies between the oral pronouncement and the minute order which cannot be corrected on appeal. We reject the claim that a separate order is required for certain fines and fees.

The probation report recommended a \$650 fine. The fine consisted of a \$200 fine, \$200 state penalty assessment (Pen. Code, § 1464, subd. (a)), \$140 county penalty assessment (Gov. Code, § 76245), \$40 in DNA penalty assessments (Gov. Code, §§ 76104.6, 76104.7), a \$30 state court facilities construction fee (Gov. Code, § 70372), and a \$40 state criminal fine surcharge (Pen. Code, § 1465.7, subd. (a)). Above this \$650 fine, there is a handwritten notation of "770."

The probation report also recommended a \$162.50 criminal laboratory analysis fee (lab fee). The lab fee consisted of a \$50 fee (Health & Saf. Code, § 11372.5), a \$50 state penalty assessment, a \$35 county penalty assessment, \$10 in DNA penalty assessments, a \$7.50 state court facilities construction fee, and a \$10 state criminal fine surcharge. Above this \$162.50 lab fee, there is a handwritten notation of "180."

The probation report recommended a \$20 court security fee (Pen. Code, § 1465.8, subd. (a)(1)) and a \$90 criminal conviction assessment fee (Gov. Code, § 70373). Both of these fees are crossed out in handwriting.

At sentencing, the court imposed a \$770 fine and a \$180 lab fee. The court inquired, "Counsel, you waive a specification of assessments and statutory authority?" Defense counsel responded affirmatively. The court then stated, "The court security fee and the criminal conviction assessment are all included in the fine."

The minute order, however, reflects that defendant was ordered to pay a \$720 fine. The fine consisted of a \$200 fine, \$200 state penalty assessment, \$140 county penalty assessment, \$40 in DNA penalty assessments, a \$100 state court facilities construction fee, and a \$40 state criminal fine surcharge.

The minute order also reflects a lab fee of \$180. The lab fee consisted of a \$50 fee, \$50 state penalty assessment, \$35 county penalty assessment, \$10 in DNA penalty assessments, a \$25 state court facilities construction fee, and a \$10 state criminal fine surcharge.

The minute order reflects that defendant was ordered to pay a \$100 court security fee (Pen. Code, § 1465.8, subd. (a)(1)) and a \$120 criminal conviction assessment fee (Gov. Code, § 70373).

Although defendant correctly argues that the minute order does not accurately record the oral pronouncement of judgment with respect to the foregoing fine and lab fee, the matter cannot be remedied on appeal under the circumstances here. The \$100 court security fee is incorrect. Defendant entered a plea to five counts, but the court dismissed one count as lesser included. Defendant stood before the sentencing court convicted of four counts. Pursuant to Penal Code section 1465.8 in effect at the time of sentencing (March 3, 2009), the amount was \$20 for each conviction for a total of \$80.<sup>1</sup> The court believed that the fine and lab fee included the court security fee as well as the criminal conviction assessment fee. They did not. The probation report did not cite Penal Code section 1465.8 (court security fee) or Government Code section 70373 (criminal conviction assessment fee) in the calculation of the fine and lab fee. Both were set forth separately. We must remand for an accurate calculation/listing of the fine, fee and assessments imposed.

With respect to the probation order, defendant contends that the court security fee, the criminal conviction assessment fee, and lab fee, cannot be made conditions of probation; instead, these fees and assessments should be imposed, he

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<sup>1</sup> Effective July 28, 2009, Penal Code section 1465.8 was amended to provide for a court security fee of \$30 for each conviction. (Stats. 2009-2010, 4th Ex. Sess., ch. 22, § 29.)

claims, by separate order. The People concede. We reject the concession. Defendant cites no relevant authority prohibiting these fees and assessments as conditions of probation. Both parties cite cases which do not apply to a court security fee, assessments, or a lab fee, but instead, apply to probation costs (probation supervision, preparation of probation report, etc.) imposed pursuant to Penal Code section 1203.1b. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067; *People v. Hall* (2002) 103 Cal.App.4th 889, 892; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 322; *People v. Washington* (2002) 100 Cal.App.4th 590, 591-596; *People v. Hart* (1998) 65 Cal.App.4th 902, 906-907.)

Pursuant to this court's Miscellaneous Order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. (Ct. App., Third App. Dist., Misc. Order No. 2010-002.) As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (§ 4019, subds. (b)(1), (2), (c)(1), (2); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.) Consequently,

defendant having served two days of presentence custody, is entitled to two days of conduct credit.

**DISPOSITION**

The matter is remanded to the trial court for an accurate calculation/listing of the fees, fines and assessments imposed. The judgment is modified to provide for two days of conduct credit. The judgment is otherwise affirmed.

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CANTIL-SAKAUYE, J.

We concur:

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SIMS, Acting P. J.

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HULL, J.